

REC'D JUN 20 2016

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

RUBENSTEIN'S CONTRACT CARPET,)	
LLC)	
)	
Plaintiff,)	NO.
)	
vs.)	<u>INSURANCE COMMISSIONER'S</u>
)	<u>CERTIFICATE OF SERVICE</u>
CONTINENTAL INSURANCE COMPANY,)	
a corporation; and CONTINENTAL)	
CASUALTY COMPANY, a)	
corporation,)	
)	
Defendant,)	

THIS IS TO CERTIFY that the Insurance Commissioner of the State of Washington has accepted service of

Summons to Continental Insurance Company; Complaint for Declaratory Relief and Monetary Damages; Plaintiff's First Requests for Production to Continental Insurance Company

in the above-mentioned matter on JUNE 13, 2016, on behalf of and as statutory attorney for

CONTINENTAL INSURANCE COMPANY THE

an authorized foreign or alien insurer, and has forwarded a duplicate copy thereof to said insurance company pursuant to RCW 48.02.200 and 48.05.200.

ISSUED AT OLYMPIA, WASHINGTON: JUNE 14, 2016

Tracker ID: 14498

Certification No: 70151730000060080679

MIKE KREIDLER

Insurance Commissioner

By

Nicole Rayl

Service of Process Coordinator

Original to:

STEPHANIE L. GRASSIA
HELSELL FETTERMAN LLP
1001 FOURTH AVENUE, SUITE 4200
SEATTLE, WA 98154

Copy to:

CONTINENTAL INSURANCE
COMPANY THE
C/O JONATHAN D KANTOR
333 S WABASH AVE
CHICAGO, IL 60604

Tracker ID: 14498

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

RUBENSTEIN'S CONTRACT CARPET,
LLC

Plaintiff,

v.

CONTINENTAL INSURANCE COMPANY,
a corporation; and CONTINENTAL
CASUALTY COMPANY, a corporation,

Defendants.

NO.

SUMMONS



TO: CONTINENTAL INSURANCE COMPANY, a foreign insurance company, Defendant.

A lawsuit has been started against you in the above-entitled court by RUBENSTEIN'S CONTRACT CARPET, LLC, Plaintiff. Plaintiff's claims are stated in the written complaint, a copy of which is served upon you with this summons.

In order to defend against this lawsuit, you must respond to the complaint by stating your defense in writing, and by serving a copy upon the person signing this summons, within 40 days after the service of this summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where the plaintiff is entitled to what they ask for because you have not responded. If you serve a notice of appearance on the undersigned person, you are entitled to notice before a default judgment may be entered.

SUMMONS TO CONTINENTAL INSURANCE COMPANY - 1

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Helsell Fetterman LLP
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Seattle, WA 98154-1154
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This summons is issued pursuant to Rule 4 of the Superior Court Civil Rules of the state of Washington.

HELSELL FETTERMAN LLP

Stephanie L. Grassia, WSBA No. 34907
Attorney For Plaintiff
1001 Fourth Ave., Ste. 4200
Seattle, WA 98154-1154
T: (206) 292-1144 / F: (206) 340-0902
E: sgrassia@helsell.com

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Hesselgesser Decl., Ex. A
Page 4 of 33

7/25

REC'D JUN 20 2016

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

RUBENSTEIN'S CONTRACT CARPET,)	
LLC)	
)	
Plaintiff,)	NO.
)	
vs.)	<u>INSURANCE COMMISSIONER'S</u>
)	<u>CERTIFICATE OF SERVICE</u>
CONTINENTAL INSURANCE COMPANY,)	
a corporation; and CONTINENTAL)	
CASUALTY COMPANY, a)	
corporation,)	
)	
)	
Defendant.)	

THIS IS TO CERTIFY that the Insurance Commissioner of the State of Washington has accepted service of

*Summons to Continental Casualty Company; Complaint for Declaratory Relief and Monetary
Damages; Plaintiff's First Requests for Production to Continental Casualty Company*

in the above-mentioned matter on JUNE 13, 2016, on behalf of and as statutory attorney for

CONTINENTAL CASUALTY COMPANY

an authorized foreign or alien insurer, and has forwarded a duplicate copy thereof to said insurance company pursuant to RCW 48.02.200 and 48.05.200.

ISSUED AT OLYMPIA, WASHINGTON: JUNE 14, 2016

E2B6524D

Tracker ID: 14499

Certification No: 70151730000060080686

MIKE KREIDLER

Insurance Commissioner

By

Nicole Rayl

Service of Process Coordinator

Original to:

STEPHANIE L. GRASSIA
HELSELL FETTERMAN LLP
1001 FOURTH AVENUE, SUITE 4200
SEATTLE, WA 98154

Copy to:

CONTINENTAL CASUALTY COMPANY
C/O JONATHAN D KANTOR
333 S WABASH
CHICAGO, IL 60604

Tracker ID: 14499



SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

RUBENSTEIN'S CONTRACT CARPET,
LLC

Plaintiff,

v.

CONTINENTAL INSURANCE COMPANY,
a corporation; and CONTINENTAL
CASUALTY COMPANY, a corporation,

Defendants.

NO.

SUMMONS

TO: CONTINENTAL CASUALTY COMPANY, a foreign insurance company, Defendant.

A lawsuit has been started against you in the above-entitled court by RUBENSTEIN'S CONTRACT CARPET, LLC, Plaintiff. Plaintiff's claims are stated in the written complaint, a copy of which is served upon you with this summons.

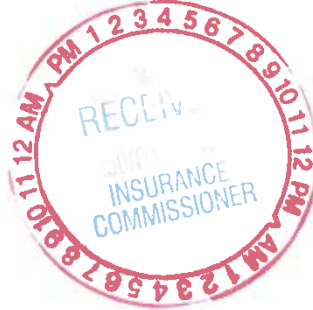
In order to defend against this lawsuit, you must respond to the complaint by stating your defense in writing, and by serving a copy upon the person signing this summons, within 40 days after the service of this summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where the plaintiff is entitled to what they ask for because you have not responded. If you serve a notice of appearance on the undersigned person, you are entitled to notice before a default judgment may be entered.

SUMMONS TO CONTINENTAL CASUALTY COMPANY - I

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This summons is issued pursuant to Rule 4 of the Superior Court Civil Rules of the state of Washington.



SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

RUBENSTEIN'S CONTRACT CARPET,
LLC

Plaintiff,

v.

CONTINENTAL INSURANCE COMPANY,
a corporation; and CONTINENTAL
CASUALTY COMPANY, a corporation,

Defendants.

NO.

COMPLAINT FOR
DECLARATORY RELIEF AND
MONETARY DAMAGES

I. INTRODUCTION

It is a cornerstone of Washington insurance law that an insurer may never place its own interests above those of its insureds. The conduct described in this complaint at all pertinent times violated this cornerstone rule.

II. PARTIES & VENUE

1. Plaintiff Rubenstein's Contract Carpet, LLC ("Rubenstein's") is a limited liability company organized under Washington law. Plaintiff is duly licensed to do business in Washington, state, and more specifically, King County, and has satisfied all requisites of this suit.

COMPLAINT FOR DECLARATORY RELIEF
AND MONETARY DAMAGES - 1

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2. Defendant Continental Insurance Company and defendant Continental Casualty Company (collectively "CNA") are corporations organized outside the state of Washington, and are licensed to do business in King County. At all relevant times hereto, CNA did business in King County and is subject to suit here. The companies are affiliates of CNA, and have no employees. They are operated by an affiliated CNA entity currently unknown to plaintiff.

3. The amount in controversy in this suit exceeds the jurisdictional minimum of mandatory arbitration, but does not, exclusive of interest or attorneys' fees, exceed \$75,000.

III. FACTUAL ALLEGATIONS

A. The Insurance Policies.

4. Defendants delivered two policies here at issue to plaintiff: policy number 5083126503 and policy number 5083126498. These policies were delivered in the state of Washington, and are subject to the Washington Insurance Code pursuant to RCW 48.01.020 and 48.01.060.

5. Policy number 5083126503 impliedly promised that the defense provided pursuant to its terms would be performed (1) in full compliance with Washington's Rules of Professional Conduct; and (2) in compliance with the standard of care in Washington State for lawyers providing such representation. A defense which did not/does not meet those two standards constitutes an unreasonable breach of the promise of that benefit.

6. Policy number 5083126503 contained a standard "separation of insureds" provision containing language to the following effect:

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

COMPLAINT FOR DECLARATORY RELIEF
AND MONETARY DAMAGES - 2

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- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or 'suit' is brought.

B. The CNA Law Firm.

7. At all times relevant hereto, defendants and/or their affiliates/agents owned and/or operated a law firm in King County. The law firm did business under the name "Law Office of Mark C. Dean, a staff counsel office of CNA Insurance Companies." The law office is referred to herein as "the CNA Law Firm", and Mr. Dean is referenced herein as "Dean." At all times herein Dean acted within the scope and course of his employment with CNA, the latter of whom is vicariously liable for his acts and omissions.

8. At all times relevant hereto, CNA operated its law firm using monies derived from premiums paid by policyholders including plaintiff.

9. CNA operated its law firm in pursuit of its own interests, not those of its policyholders, and at all times could have satisfied its defense and good faith obligations to policyholders through retention of lawyers who were not employees of CNA and who were not under CNA direction and control. CNA did in fact ultimately retain such an independent lawyer—Roy Umlauf—but only after plaintiff had suffered the harm and damages described herein.

10. Prior to the issuance of policies delivered in Washington, CNA deliberately did not disclose to its policyholders that it owned and operated its own law firm, or that it intended to satisfy any part of its policy obligations through lawyer employees.

11. On information and belief, plaintiff alleges CNA determined it would be at a competitive disadvantage if it disclosed in its policy that it intended to fulfill some or all of its defense benefit commitments through employee counsel, or through an office owned and

COMPLAINT FOR DECLARATORY RELIEF
AND MONETARY DAMAGES - 3

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1 operated by CNA. It is the policy and practice of CNA *not* to disclose to the marketplace in
 2 which it markets its Washington liability policies that it (1) owns or operates a law firm and/or
 3 (2) secretly intends to satisfy some or all of its defense obligations through that law firm and/or
 4 through employee attorneys and staff.

5
 6 12. At all times relevant hereto, CNA deliberately allowed its employee lawyers to
 7 counsel CNA on issues related to good faith/bad faith toward the very policyholders CNA had
 8 assigned its employee-lawyers to represent.

9
 10 13. At all times relevant hereto, CNA deliberately concealed from the marketplace in
 11 Washington State that it allowed its employee lawyers to simultaneously counsel CNA on good
 12 faith/bad faith issues towards its policyholders while representing those very same policyholders.

13
 14 14. At all times pertinent hereto, CNA deliberately failed to maintain any assignment-by-
 15 assignment oversight of its employee lawyers to assure each employee lawyer was discharging
 16 his/her assignment in full compliance with applicable Washington Rules of Professional
 17 Conduct.

18
 19 15. At all times pertinent hereto, CNA deliberately allowed its employee attorneys to have
 20 secret communications with assigned Claims Directors or Claims Supervisors which were
 21 deliberately *not* sent on to the client or policyholder by either the employee lawyer or the
 22 assigned claim representative.

23
 24 16. At all times pertinent hereto, CNA deliberately concealed from the marketplace that
 25 defense benefits it sold in Washington to policyholders would sometimes be afforded through
 employee attorneys who would deliberately *not* send communications to/from claim
 representatives concerning their representation to their assigned clients.

COMPLAINT FOR DECLARATORY RELIEF
 AND MONETARY DAMAGES - 4

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1 17. At all times pertinent hereto, the procedures and communication tactics employed by
2 CNA claim representatives and CNA employee lawyers violated (1) RPC 1.4; (2) the standard of
3 care for attorneys and law firms in Washington State; (3) RCW 19.86; (4) the common law duty
4 of good faith dealing; and (5) when done in a manner so as to permeate the entire defense
5 promised as a policy benefit, RCW 48.30.015(1).
6

7 18. At all times pertinent hereto, CNA deliberately failed to maintain procedures whereby
8 its employees were required (at the outset of representation) to solicit or obtain informed consent
9 from the client to limits on the scope of representation. Alternatively, CNA failed to maintain
10 reasonable safeguards that its employee lawyers were in fact soliciting and obtaining informed
11 consent from their assigned clients to limits on scope of representation prior to the
12 commencement of that representation.
13

14 19. At all times material hereto, there were non-CNA employee attorneys available to
15 CNA in the greater Puget Sound area who met or exceeded all applicable standards of reasonable
16 care and who furnished representation compliant with the Rules of Professional Conduct, and
17 who at all times during their representation of their assigned clients refrained from sending secret
18 emails to adjusters and from counseling the assigning insurer on issues of good faith/bad faith
19 toward their assigned clients. On an assignment-by assignment basis, representation by those
20 attorneys was more expensive than representation by CNA employee-attorneys. CNA
21 nevertheless consistently placed its own financial interests and interests of private
22 communication over those of its policyholders in receiving a defense free from the influences
23 CNA was secretly exerting over its employee-attorneys.
24
25

COMPLAINT FOR DECLARATORY RELIEF
AND MONETARY DAMAGES - 5

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1 20. CNA could have maintained a procedure whereby it did not assign employee attorneys
 2 to defend claims which presented inherent conflicts of interest (such as reservation of rights
 3 cases, including cases where CNA issued a written reservation of its right not to pay that portion
 4 of any judgment or settlement above policy limits) but deliberately (1) failed to do so, and (2)
 5 failed to inform the marketplace in Washington of its intent (as of policy issuance) to satisfy the
 6 defense benefit promised in its policy through employee lawyers even in representations that
 7 involved "inherent conflicts".
 8

9 21. At all times relevant hereto, CNA deliberately maintained no procedure whereby a
 10 supervisor of its employee lawyers would make an independent determination whether
 11 representation in a given case involved a "significant risk that the representation of one or more
 12 clients will be materially limited by the lawyer's responsibility to *another client*, a former client
 13 *or a third person* or by *a personal interest of the lawyer*." Accordingly CNA employee lawyers
 14 were at all times free to avoid the obligations of RPC 1.7 either by (1) not conducting an
 15 independent analysis of the application of the rule to a particular assignment, or (2) favoring the
 16 interests of his/her employer over the assigned client by concluding the predicate ("significant
 17 risk...") did not exist, so that the prospective client could not request appointment of a non-CNA
 18 employee attorney.
 19
 20

21 22. At all times pertinent hereto, the circumstances described in paragraphs 5-21 above
 22 were unknown to the Puget Sound marketplace to which CNA marketed and sold its liability
 23 policies.
 24

25 23. At all times pertinent hereto, the practices described in paragraphs 5-21 above was and
 is unfair and deceptive.

COMPLAINT FOR DECLARATORY RELIEF
 AND MONETARY DAMAGES - 6

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1 24. At all times pertinent hereto, the practices described in paragraphs 5-21 above was and
2 is done by CNA within the sphere of trade or commerce.

3 25. At all times pertinent hereto, the practices described in paragraphs 5-21 herein affect
4 the public interest.

5 26. At all times pertinent hereto, the conduct described in paragraphs 5-21 above had the
6 capacity and/or tendency to deceive.

7 27. The defense benefit promised by CNA in its policies of insurance marketed in the
8 Puget Sound community contractually required a defense performed in full accordance with
9 Washington's Rules of Professional Conduct, such that a defense which did *not* conform to
10 Washington's Rules of Professional Conduct constitutes an unreasonable breach of the
11 contractual duty to provide that policy benefit.
12

13 C. The Estate of Kung Claim

14 27. On August 29, 2014, a truck driven by plaintiff's employee Roberto Garza ("Garza")
15 struck and killed bicyclist Sher Kung at the corner of Second and University in downtown
16 Seattle.
17

18 28. Plaintiff timely reported the accident to CNA.

19 29. CNA immediately set up a "claim" and a "claim file", the latter within the meaning of
20 WAC 284-30-340, and conducted an "investigation" as that term is defined in WAC 284-30-
21 320(9). Among other professionals, Lynn Leonard, Mark Dean, and Stephanie Andersen
22 performed tasks as part of CNA's "investigation." All activities performed by Leonard, Dean and
23 Andersen were activities embraced within the term "investigation" as defined in WAC 284-30-
24 320(9).
25

COMPLAINT FOR DECLARATORY RELIEF
AND MONETARY DAMAGES - 7

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1 30. CNA determined that both plaintiff and Garza qualified as insureds under the policy.

2 31. CNA knew, at the time it appointed defense counsel, that the Separation of Insureds
3 provision applied to Rubenstein and Garza.

4 32. It was the interest of CNA to use a single attorney to represent Garza and plaintiff
5 simultaneously.

6 33. It was the interest of CNA to assign an employee lawyer to represent both
7 simultaneously.

8 34. It was the interest of CNA *not* to request the consent of either Garza or plaintiff to
9 simultaneous representation notwithstanding the Separation of Insureds provision of the primary
10 policy.

11 35. CNA did not request the consent of either plaintiff or Garza to joint representation.

12 36. On information and belief, plaintiff alleges CNA did not, in its claim file, document
13 that it had requested the consent of either plaintiff or Garza to joint representation.

14 37. Dean did not request the consent of either plaintiff or Garza to joint representation.

15 38. On information and belief plaintiff alleges CNA did not document in its claim file that
16 Dean had requested or obtained consent (informed or otherwise) to joint representation.

17 39. Prior to commencing his representation, Dean did not limit the scope of his
18 representation of plaintiff.

19 40. Prior to commencing his representation Dean did not seek plaintiff's consent
20 (informed or otherwise) to any limit of any kind upon his representation of plaintiff herein.

21
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COMPLAINT FOR DECLARATORY RELIEF
AND MONETARY DAMAGES - 8

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1 41. Prior to commencing his joint representation, Dean did not disclose to plaintiff herein
2 that Dean would be unable to represent plaintiff's interests to the extent they were adverse to
3 those of Garza.

4 42. Prior to commencing his joint representation, Dean did not inform plaintiff herein that
5 Dean's joint representation of plaintiff and Garza would limit or potentially limit his ability to
6 represent plaintiff on matters for which plaintiff was adverse or potentially adverse to Garza.

7 43. Prior to the commencement of Dean's representation plaintiff alleges on information
8 and belief CNA did not document in its claim file that Dean had informed plaintiff of the
9 potential that his representation of Garza might limit his representation of plaintiff.
10

11 44. At the beginning of Dean's representation of plaintiff, plaintiff's principal Randy
12 Rubenstein ("Rubenstein") told Dean that Rubenstein was "not comfortable with [Dean's]
13 conflicts."
14

15 45. Dean did not deny that conflicts existed.

16 46. Dean did not seek plaintiff's informed consent to proceed with his representation
17 notwithstanding Rubenstein's statement about Dean's conflicts.
18

19 47. It was reasonably foreseeable to Dean and CNA that Dean's continued representation
20 of plaintiff after Rubenstein had stated his concerns about Dean's conflicts, would cause plaintiff
21 to incur fees from a lawyer who had no such conflicts.

22 48. As a proximate result of CNA's failure to appoint plaintiff counsel free of the conflicts
23 Dean had, plaintiff was damaged in the amount of legal expenses it incurred for conflict-free
24 representation.
25

COMPLAINT FOR DECLARATORY RELIEF
AND MONETARY DAMAGES - 9

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1 49. From the point of Dean's first representation of plaintiff following Rubenstein's
2 statement to Dean of his concern for Dean's conflicts, CNA was in unreasonable breach of its
3 defense obligation under its primary policy.

4 50. Dean did not seek or obtain informed consent from either plaintiff or Garza as
5 described in RPC 1.7(b)(4), nor did CNA's claim file document that he had obtained such
6 consent.

7 51. At no time during his representation of plaintiff from start to finish did Dean seek or
8 have plaintiff's consent as described in RPC 1.7(b).

9 52. On information and belief, plaintiff alleges that at no time during CNA's maintenance
10 of the claim file it was required by WAC 284-30-340 to keep did that file document that Dean
11 had obtained the written consent from plaintiff described in RPC 1.7.

12 53. At no time during his representation did Dean seek plaintiff's permission to conduct
13 private communications with Claims Director Lynn Leonard concerning his representation of
14 plaintiff.

15 54. CNA's claims file does not document any request of Dean to plaintiff for permission
16 to conduct private communications with Lynn Leonard concerning his representation of plaintiff.

17 55. Over the course of Dean's representation of plaintiff, Dean had more than 15 private
18 communications with Claims Director Lynn Leonard in which he discussed strategy and the
19 means and methods he intended to use for accomplishment of the objectives of his
20 representation. Neither Dean nor Leonard provided copies to plaintiff or Garza, and neither Dean
21 nor Leonard requested or obtained plaintiff's permission to have such private communications
22 concerning the subject of the defense CNA was providing through Dean. The failure of both
23
24
25

COMPLAINT FOR DECLARATORY RELIEF
AND MONETARY DAMAGES - 10

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1 Dean and Leonard to send their private communications to Rubenstein's was deliberate. The
 2 failure to discuss with plaintiff the means and methods he had secretly discussed with Ms.
 3 Leonard violated RPC 1.2.

4
 5 56. In one of the private emails Dean knowingly concealed from Rubenstein/plaintiff,
 6 Dean made clear that he was counseling CNA on how to avoid a bad faith claim against CNA by
 7 his own client Rubenstein's. In referring to Rubenstein's, he refers to it as "the insured", not as
 8 "my client":

9 Hi Lynn. This is a recent hot topic. Plaintiff's attorneys use a recent Supreme
 10 Court bad faith case to argue that it is bad faith for an insurer not to disclose
 11 policy limits to a third party claimant prior to suit when requested. The case does
 12 not say that much. However it did hold that under certain circumstances it can be
 13 bad faith for an insurer not to disclose. I agree with you. There is no advantage to
 withholding the disclosure of policy limits. It will just force the claimant to file
 suit where she can compel disclosure.

14 I will write to Randy Rubenstein with the recommendation that we disclose limits.
 15 If he declines, then there is no bad faith in our following the insured's
 request. I will let you know.

16
 17 57. One of CNA's interests (not shared by plaintiff) was to withhold defense benefits until
 18 after mediation of Estate of Kung's claim, particularly when such an expense might document
 19 claim value beyond what CNA wanted to pay to settle the claim. When co-defendant City of
 20 Seattle scheduled a set of focus groups to research verdict value, Dean and Leonard had private
 21 discussions outside the earshot or sight of Dean's assigned clients. This was deliberate on both
 22 their parts. Leonard ultimately determined she did not want to have CNA-procured focus group
 23 "verdicts" in her claim file before mediation with the *Estate*, and both Dean and Leonard
 24 conducted their communications on the subject privately with one another so Dean would not
 25 have to discuss with his clients the advisability of obtaining pre-mediation verdict research as the

COMPLAINT FOR DECLARATORY RELIEF
 AND MONETARY DAMAGES - 11

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1 City did. The following is an example of the private communications Dean and Leonard
 2 concealed from Rubenstein:

3 Hi Lynn, [Dean's associate] Lisa [Hammel] solicited a cost proposal from a jury
 4 research vendor that she has used before and liked on several occasions. Lisa's
 5 explanatory email with the vendor's proposal is below. We know it is too soon for
 6 jury research/mock trial and that CNA has another approved vendor. But when
 7 the time is right and if we decide to do jury research by way of a focus group
 8 or mock trial, we can compare this proposal with CNA's approved vendor to
 9 help make a decision. This vendor's cost is \$21,500-\$23,200. I will put this
 10 information on hold until we need it.

11 When Dean privately advised Ms. Leonard that the City was going to conduct
 12 focus group research into verdict ranges, Dean and Ms. Leonard once again engaged in
 13 private communications with one another, and Dean told Ms. Leonard he had no strong
 14 feelings that the research should be done before the mediation:

15 ...We [Dean and Leonard] are in agreement not to participate with the City in a
 16 joint mock jury. I will let the city attorney know without going into the reasons. I
 17 do not feel strongly about whether to do a mock jury before mediation or wait to
 18 see if it settled first.

19 Ms. Leonard did not want to conduct the research as part of CNA's investigation into the
 20 value of the claim prior to mediation because (1) she didn't want to incur the expense, but more
 21 importantly (2) she didn't want to run the risk that the research would come in significantly
 22 higher than the reserves she had posted—a mere \$2,897,200 (a fraction of what CNA ultimately
 23 authorized in settlement authority).

24 On information and belief, plaintiff alleges that neither Mr. Dean nor Ms. Leonard
 25 solicited Rubenstein's input on the issue because neither wanted to run the risk that Rubenstein's
 would ask for research to be done.

COMPLAINT FOR DECLARATORY RELIEF
 AND MONETARY DAMAGES - 12

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1 RPC 1.2 requires that an attorney discuss the “means and methods” by which the attorney
 2 is attempting to accomplish the client’s objective, which in this case was settlement within policy
 3 limits. Dean deliberately violated this requirement because of his allegiance to his employer and
 4 because his employer’s interest was that the research not be conducted prior to mediation.
 5

6 58. During the first year of Dean’s representation of Rubenstein’s and Garza, CNA elected
 7 not to issue a “limits letter.”

8 59. During the entirety of that year, CNA elected to have Rubenstein’s and Garza
 9 represented by CNA employee counsel. At no point during that first year did either Dean or Ms.
 10 Leonard advise Rubenstein’s that CNA reserved the right later in Dean’s representation to issue a
 11 “limits letter.”
 12

13 60. Dean’s professional obligation to Rubenstein’s was to be its eyes, ears and voice. At
 14 times throughout his representation, he was the eyes, ears and voice of Lynn Leonard to the
 15 exclusion of Rubenstein’s.

16 61. At all times during his representation of Rubenstein’s, Dean had access to CNA’s
 17 investigation. At an early point, Dean described that file as “informative.” And yet at no point
 18 did Dean share that information with Rubenstein’s nor did he advise Rubenstein’s he had access
 19 to it or that it discussed CNA’s strategies for resolving the claim. Dean did this deliberately
 20 because there was only so much about his employer’s strategy for resolution of the claim that he
 21 wanted his assigned clients to know. In particular, Dean had access to the reserves his employer
 22 had posted for the claim, but at no point did he communicate that information to plaintiff.
 23

24 62. On information and belief, plaintiff alleges CNA maintained requirements of its
 25 defense attorneys (including its employee attorneys) that it furnish regular reports concerning

COMPLAINT FOR DECLARATORY RELIEF
 AND MONETARY DAMAGES - 13

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1 their representation, investigation, and defense attorney activity. In the instant case, Dean
 2 prepared an "Initial Case Analysis Report" in January of 2015, and when he forwarded it to
 3 Randy Rubenstein, stated that "it will be revised as we learn more." Despite the fact CNA and
 4 Dean continued to "learn more" every one of the ensuing 14 months, for fourteen months Dean
 5 deliberately did not prepare an updated report, so as to avoid committing CNA in writing on
 6 Dean's evaluation of reasonable settlement value, and to better position CNA to execute its own
 7 objective—which conflicted with that of Rubenstein's—which was to attempt to settle the claim
 8 far below reasonable settlement value while simultaneously reserving its right not to pay any
 9 portion of an excess verdict which resulted from its aggressive settlement tactics. Throughout
 10 this fourteen month period, Dean and Leonard were the co-architects of CNA's strategy.

11
 12
 13 63. On August 31, 2015, the *Kung* Estate served its suit upon plaintiff, who immediately
 14 forwarded it to CNA.

15 64. On October 2, 2015, CNA for the first time purported to reserve its rights not to pay
 16 that portion of any settlement or judgment in excess of \$11 million. Dean failed to limit his
 17 representation of Rubenstein's in any respect (at that point) nor did he disclose conflicts he had
 18 as an employee of CNA and simultaneously as joint counsel for Rubenstein's and Garza. In its
 19 October 2, 2015 correspondence, and despite the fact Dean had not previously limited the scope
 20 of his representation to protection of just that amount of disclosure within policy limits, CNA
 21 advised that should Rubenstein's desire to have counsel concerning excess exposure it was
 22 obligated to retain counsel on its own behalf at its own expense. This constituted a violation of
 23 CNA's duties under *Moratti v. Farmers*, and also constituted a promotion of its own interests
 24
 25

COMPLAINT FOR DECLARATORY RELIEF
 AND MONETARY DAMAGES - 14

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1 over those of Rubenstein's in paying for less than *full* representation of *all* of Rubenstein's
2 exposure.

3 65. As of October 2, 2015 plaintiff and CNA had conflicting interests with regard to the
4 dollar amount at which the *Kung* Estate claim could/should be settled.
5

6 66. As of October 2, 2015, it was in CNA's interests that it evaluate the reasonable
7 settlement value so as to be consistent with the reserves it had previously set, and its target
8 settlement range (\$3.5 million) for the claim, whereas it was in Rubenstein's interests that (1) the
9 settlement range be evaluated by a non-employee of CNA; (2) that the settlement value be
10 evaluated with all the tools available to aid in the evaluation, including but not limited to pre-
11 mediation jury verdict research, and (3) a settlement strategy that was driven by the insured's
12 interests in obtaining a settlement within policy limits, not one which attempted to achieve the
13 lowest possible settlement with the greatest amount of excess exposure.
14

15 67. As of October 2, 2015 both Dean and Ms. Leonard were or should have been aware of
16 the conflicting and diverse interests between CNA on the one hand and Rubenstein's on the
17 other.
18

19 68. Having recommended to Rubenstein's that it authorize the disclosure of policy limits
20 to the *Kung* Estate, and having obtained Rubenstein's authority to do so (and having in fact done
21 so), Dean knew then there was a substantial risk that the *Kung* Estate would make an offer to
22 settle for policy limits, and that if it did so, he would have a conflict of interest between that of
23 his employer and that owed to Rubenstein's. Nevertheless Dean would fail for approximately 6
24 months to advise Rubenstein's of this conflict.
25

COMPLAINT FOR DECLARATORY RELIEF
AND MONETARY DAMAGES - 15

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69. On October 30, 2015, Dean wrote to Randy Rubenstein and informed him of a conflict of interest he had in the simultaneous representation of Roberto Garza and Rubenstein's Contract Carpet LLC. Dean wrote:

Hello again Randy. It occurred to me you should not rely on my advice as to whether your company should file a cross claim against Roberto if suit is filed. We are the attorneys for both your company and Roberto. It would be a conflict of interest for me to recommend that one client file a cross claim against the other. If you want to know whether to allege a cross claim against Roberto, you should rely on private counsel for advice.

No supervisor of Dean was reviewing his client file to determine whether or not Dean himself felt he was able to provide conflict-free representation. At the time Dean/CNA wrote his October 30 mail, CNA (1) knew of Dean's conflict of interest in the simultaneous representation of Garza and Rubenstein's, (2) had acknowledged it, (3) did not require Dean to seek written consent from Rubenstein's regarding Dean's ongoing simultaneous representation, in violation of RPC 1.7(b), (4) could and did reasonably foresee that Dean's mail would cause Rubenstein's to incur damages in the form of legal fees from conflict free "private counsel", and (5) deliberately failed to appoint counsel to represent Rubenstein's who was not simultaneously representing Garza.

CNA compounded the situation by concealing from Rubenstein's information Dean developed which was unfavorable to Garza, and which would have favored a cross claim by Rubenstein against Garza (e.g. Leonard mail to Dean dated February 19, 2016).

70. On March 16, 2016, the Kung Estate served Dean with an offer to settle all claims against Dean's assigned clients for \$1 less than the policy limits. For the second time, Dean recommended to Rubenstein's that it retain independent counsel.

COMPLAINT FOR DECLARATORY RELIEF
AND MONETARY DAMAGES - 16

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1 71. Upon Dean's receipt of the March 16, 2016 offer, Dean knew he had an actual conflict
 2 of interest between the interest of his employer CNA (who still had reserved the case at less than
 3 \$3 million and desired to negotiate within those parameters) and the interest of Rubenstein's and
 4 Garza, who figuratively and literally had no interest in taking the risk posed by the
 5 aggressiveness of negotiation it would take to pursue a settlement within the range of the
 6 understated CNA reserves.
 7

8 72. From November of 2014 (after Dean failed to take any action within CNA to obtain
 9 Rubenstein's counsel independent from Garza and CNA) Rubenstein's hired independent
 10 counsel—the Ashbaugh Beal (AB) firm and Rick Beal (Beal). Had CNA retained independent
 11 counsel from the beginning (separately for Rubenstein and separately for Garza) Rubenstein
 12 would not have been damaged in the amount of fees it incurred for independent and conflict-free
 13 representation.
 14

15 73. Following receipt of Dean's March 16, 2016 correspondence, Rubenstein determined
 16 that because of the conflicts of interest, he wished to retain Beal and AB to participate in the pre-
 17 mediation and mediation activities to provide the conflict-free representation he was not
 18 receiving from CNA or Dean.
 19

20 74. On March 31, 2016, Dean Rubenstein and Beal met at Beal's office.

21 75. During the meeting Rubenstein reminded Dean that Rubenstein had expressed concern
 22 over Dean's conflicts "from the very beginning."
 23

24 76. Dean replied that Rubenstein was correct—that Rubenstein had in fact expressed
 25 concern about Dean's conflict of interest "from the beginning."

COMPLAINT FOR DECLARATORY RELIEF
 AND MONETARY DAMAGES - 17

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1 77. Beal asked Dean if Dean had limited his scope of representation as discussed in RPC
2 1.2, and Dean admitted he had not.

3 78. Beal asked if Dean had requested written consent to Dean's representation as
4 described in RPC 1.7(b) and Dean admitted he had not.

5 79. Beal asked Dean if Dean agreed he had a conflict of interest moving forward in light
6 of the Limits proposal, and Dean acknowledged that he did.

7 80. Beal then expressed concern that if he (Beal) attended the mediation as independent
8 counsel for Rubenstein's, that either the *Kung* estate, the City, or both, would take a more
9 aggressive settlement position than if CNA appointed an outside "insurance defense" attorney to
10 represent Rubenstein's and a different outside "insurance defense" attorney to represent Garza.
11 Dean stated he agreed with Beal.

12 Beal and Dean then came up with slates of three insurance defense attorneys Beal and
13 Dean were both able to recommend (Beal to Rubenstein's and Dean to his employer).

14 81. The following day, CNA representative and attorney Stephanie Andersen contacted
15 Beal's assistant, and requested a face to face meeting that morning. Ms. Andersen met with Beal
16 at his office shortly before noon.

17 82. Among other things, Ms. Andersen told Beal that she had been retained by CNA to
18 investigate Rubenstein's claim of entitlement to a defense by counsel free of conflicts. She
19 indicated she had participated in CNA's investigation into Rubenstein's claim that it was entitled
20 to conflict-free counsel and that she had been asked by CNA to serve as its spokesperson with
21 Rubenstein's and, in her words, "to work with Rubenstein's to resolve the conflict issues." She
22 stated that CNA had chosen Forsberg and Umlauf to replace Ashbaugh Beal as independent
23
24
25

COMPLAINT FOR DECLARATORY RELIEF
AND MONETARY DAMAGES - 18

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1 counsel for Rubenstein's, and Reed McClure/Jack Rankin to serve as independent counsel for
 2 Garza. She acknowledged, as Dean had done the day before, that she and CNA had both
 3 concluded Dean had conflicts, and that she and CNA agreed with Beal that the Estate and the
 4 City (whom Beal had previously represented as insurance coverage counsel) would be less likely
 5 to take advantage of the situation if insurance defense counsel rather than coverage counsel
 6 appeared on behalf of the insureds. Ultimately due to Reed McClure's unavailability on short
 7 notice, CNA appointed Lori O'Toole of the Preg O'Donnell firm to serve as independent counsel
 8 at the mediation and pre meeting for Garza.
 9

10 83. On or about April 6, 2016, with Beal's permission, Ms. Andersen met directly with
 11 Rubenstein, and informed him that in light of Dean's conflicts, she would recommend that CNA
 12 reimburse Rubenstein's for fees it incurred following March 22, when Rubenstein retained the
 13 AB Firm to serve as independent counsel for Rubenstein's, through the transition of that
 14 representation to the Forsberg and Umlauf Firm, and that she would recommend that CNA make
 15 payment. She added that she did "not control the purse strings."
 16

17 84. Following his retention as independent counsel for Rubenstein's, attorney Roy Umlauf
 18 provided his evaluation of reasonable settlement value. His evaluation of reasonable value was
 19 up to \$7 million on behalf of Rubenstein's and Garza. This independent evaluation was double
 20 the separate written valuations of both Dean and Ms. Leonard, provided for the first time only
 21 after Beal demanded them on behalf of Dean's own supposed client, Rubenstein's.
 22

23 85. After full mediation with the *Kung* Estate, CNA settled the case against Rubenstein's
 24 and Garza for an amount within the evaluation of Roy Umlauf, but substantially above the
 25 evaluation of Mark Dean.

COMPLAINT FOR DECLARATORY RELIEF
 AND MONETARY DAMAGES - 19

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1 86. Following settlement, CNA representative/speaking agent Stephanie Andersen
 2 retracted her recommendation that CNA reimburse Rubenstein's for the independent counsel
 3 fees it incurred with the AB firm prior to CNA's appointment of a replacement firm, and wrote a
 4 letter characterizing Randy Rubenstein's request as a "demand" and rejecting the demand on
 5 behalf of CNA. On information and belief, plaintiff alleges CNA ultimately refused to reimburse
 6 Rubenstein's for its cost of conflict-free counsel because it knew it would cost plaintiff more to
 7 pursue that recovery than the recovery itself.

8
 9 **FIRST CAUSE OF ACTION—Breach of Contract (Continental Insurance Company)**

10 87. Plaintiff incorporates by reference each of the allegations in paragraphs 1-86 above.

11
 12 88. Defendant Continental Insurance Company had an implied contractual obligation to
 13 furnish a conflict free defense and one which complied in all respects with Washington's Rules
 14 of Professional Conduct. Defendant Continental Insurance Company also had an obligation
 15 under its Supplementary Payments clause to pay "reasonable expenses incurred at our request."
 16 Defendant Continental Insurance Company breached its defense obligation by appointing the
 17 same attorney to represent the conflicting interests of Garza and Rubenstein's simultaneously,
 18 and by continuing its purported defense through an employee lawyer who was simultaneously
 19 pursuing the separate and conflicting interests of his employer. Additionally, Continental
 20 Insurance Company breached its obligation under the Supplementary Payments clause when its
 21 employee Mark Dean requested that Rubenstein's seek advice regarding its potential claim from
 22 independent counsel and then refused to reimburse Rubenstein's for the expense incurred at
 23 CNA's request. Also, CNA breached the Supplementary Payments provision of its policy by
 24 requesting that Rubenstein's obtain personal counsel to advise it concerning the Policy Limits
 25

COMPLAINT FOR DECLARATORY RELIEF
 AND MONETARY DAMAGES - 20

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1 Offer made by the *Kung* Estate. The conduct committed by CNA and its employees and agents
 2 proximately caused damage to plaintiff herein, in the amount of defense expenses it incurred
 3 through the AB firm to provide conflict-free counsel which CNA had wrongfully failed to
 4 provide. Plaintiff has been damaged in an amount not less than \$20,000, to be more formally
 5 established by an amount to be proven at trial.
 6

7 **SECOND CAUSE OF ACTION—Breach of the Washington Consumer Protection Act**
 8 **(Both Defendants)**

9 89. Plaintiff incorporates by reference the allegations contained in paragraphs 1-88 herein.

10 90. The conduct described in paragraphs 1-88 meets each of the requirements of
 11 Consumer Protection Act violations as defined under *Hangman Ridge v. Safeco* and other
 12 applicable law.

13 91. The conduct described in paragraphs 1-88 also constitutes per se unfair and deceptive
 14 trade practices through per se violations of WAC 284-30-330(3),(4),(7) and (13).
 15

16 92. Plaintiff was foreseeably damaged by the amount of legal fees it incurred in retaining
 17 and paying conflict-free counsel prior to the time defendants finally supplied independent
 18 counsel separately for Rubenstein's and for Garza.

19 93. Plaintiff is entitled to treble damages for each violation.
 20

21 **THIRD CAUSE OF ACTION—Declaratory Judgment (Both Defendants)**

22 94. Plaintiff incorporates paragraphs 1-93 herein by reference.

23 95. There is a clear and present dispute between plaintiff and defendants concerning the
 24 obligations of defendants under contract and statutory provisions, including the policies, RCW
 25

COMPLAINT FOR DECLARATORY RELIEF
 AND MONETARY DAMAGES - 21

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1 48.01.030, RCW 19.86, RCW 48.30.015(1), and WAC 284-30-330 through 380, including but
2 not limited to the following issues:

3 A. Whether or not the policies require CNA to provide conflict-free counsel;

4 B. Whether or not CNA, from the outset, breached its policy obligation to provide
5 conflict-free counsel;

6 C. Whether or not CNA was contractually obligated to provide legal representation which
7 at all times complied with Washington's Rules of Professional Conduct;

8 D. Whether or not CNA did in fact provide legal representation which complied with
9 Washington's Rules of Professional Conduct;

10 E. Whether or not CNA violated its obligations to plaintiff pursuant to the Supplementary
11 Payments Provision of the policy;

12 F. Whether or not CNA preferred its own financial interests over those of plaintiff by
13 defending plaintiff with an employee lawyer for over a year before first reserving its rights to
14 assert the limits provision of its policy as a partial defense to payment of any settlement or
15 judgment.

16 G. Whether or not CNA violated WAC 284-30-330(3) by assigning investigational duties
17 to an employee attorney without simultaneously maintaining standards for the reasonable
18 investigation into claims for primary and excess insurance benefits to assure a fair and impartial
19 investigation which did not promote the insurer's interests over those of its insured;

20 H. Whether or not CNA violated WAC 284-30-330(4) by denying plaintiff's claim for
21 independent counsel without having conducted a reasonable investigation into its liability under
22 its Supplemental Payments and other policy provisions for same;

23
24 COMPLAINT FOR DECLARATORY RELIEF
25 AND MONETARY DAMAGES - 22

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1 I. Whether CNA violated WAC 284-30-330(7) by offering substantially less (zero) than
2 the amount ultimately to be recovered on plaintiff's claim for the cost of independent counsel.

3 J. Whether CNA violated WAC 284-30-330(13) by failing to provide a reasonable
4 explanation for its denial of plaintiff's claim for defense benefits under the policy.
5

6 K. Whether or not, under Washington law, the CNA "Limits" letter did or did not
7 constitute a "reservation of rights" as that term is used in *Tank v. State Farm*, 105 Wn.2d 381,
8 389 (1986).

9 L. Whether the "enhanced obligations" set forth in *Tank v. State Farm* are/were
10 applicable to Dean's representation of Rubenstein's;
11

12 M. Whether or not Dean's Law Office, owned and operated by CNA was legally or
13 factually in a position to "understand that only the insured is the client."

14 N. Whether or not Dean treated his employer as one of his clients during his
15 representation of Rubenstein's.

16 O. Whether or not, under the circumstances of the underlying case, CNA unreasonably
17 denied defense policy benefits to Pease, as that term is used in RCW 48.30.015(1);
18

19 P. Whether or not Dean and/or CNA violated RCW 48.30.015.

20 96. Plaintiff is entitled to Declaratory Relief pursuant to RCW 7.24 et. seq. on each of the
21 matters described above.

22 **RESERVATION FOR FOURTH CAUSE OF ACTION UNDER WASHINGTON'S**
23 **INSURANCE FAIR CONDUCT ACT (Continental Insurance Company)**

24 97. Contemporaneously with the commencement of this suit, plaintiff is serving notice
25 pursuant to RCW 48.30.015 (8) of its claim under Washington's Insurance Fair Conduct Act.

COMPLAINT FOR DECLARATORY RELIEF
AND MONETARY DAMAGES - 23

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1 Plaintiff reserves the right, following expiration of that statutory notice, to amend its complaint
2 to assert a claim under IFCA.

3
4 **IV. PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiff prays for relief as follows:

- 6 1. For money damages in an amount to be proven at trial, but no greater than \$75,000
7 exclusive of interest and attorneys' fees;
- 8 2. For declaratory relief as pled for herein;
- 9 3. For treble damages allowable by statute;
- 10 4. For prejudgment interest allowable by law;
- 11 5. For reasonable attorneys' fees and other costs of this litigation pursuant to *Olympic*
12 *Steamship v. Centennial*, *Nordstrom v. Tampourlos*; *McGreevy v. Oregon Mutual*; recognized
13 grounds of equity, and/or other applicable law.
- 14 6. For such other and further relief as the court may deem just and equitable.

15 DATED: June 10, 2016.

16
17 **HELSELL FETTERMAN LLP**

18
19 By s/ Stephanie L. Grassia
20 Stephanie L. Grassia, WSBA No. 34907
21 *Attorney For Plaintiff*
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COMPLAINT FOR DECLARATORY RELIEF
AND MONETARY DAMAGES - 24

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VERIFICATION

I, RANDALL RUBENSTEIN, of full age, certify: I am a Member of Rubenstein's Contract Carpet, LLC, plaintiff in this matter. I have read the Complaint for Declaratory Relief and Monetary Damages ("Complaint") and certify that the allegations contained in the Complaint are true and correct to the best of my knowledge and belief. I certify that the foregoing statements made by me are true.

Dated: June 10, 2016



Randall Rubenstein, Member
Rubenstein's Contract Carpet, LLC

COMPLAINT FOR DECLARATORY RELIEF
AND MONETARY DAMAGES - 25

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